No. 12,174

IN THE

United States Court of Appeals

For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN DIAZ, HERMAN LANSBURG and FRANK CARLSON,

Appellants,

vs.

I. F. WIXON, individually, and as District Director, Immigration and Naturalization Service, Department of Justice [Arthur J. Phelan, Successor, substituted therefor],

Appellee.

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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SUMMARY OF ARGUMENT.

I. The Administrative Procedure Act was intended to provide judicial review of deportation cases.

The plain meaning of the Act, which employs all-inclusive and sweeping terms, indicates a Congressional intention to do more than merely codify administrative law, or to restate already existing law. And the legislative history of the Act demonstrates that the Congress was completely aware that this legislation made changes in the existing law of judicial review.

II. The procedural requirements of the Act apply to immigration hearings.

The legislative history, including the record of testimony given on behalf of the Immigration and Naturalization Service before the Senate Committee which considered the bill, demonstrate that no doubt was entertained that the procedural provisions of the bill applied to deportation and exclusion hearings. The decided cases are inapplicable.

The Congressional policy behind this Act, to separate judicial and prosecuting functions within administrative agencies applies nowhere more clearly than in deportation proceedings.

I. LEGISLATIVE HISTORY OF SECTION 10 OF THE ACT.

A. The plain meaning and the legislative history of the Act discloses an intent on the part of Congress to provide for judicial review in cases where existing law failed to provide for it.

Appellees contend that the legislative history of the Administrative Procedure Act, 5 U.S.C.A. §1001 et seq. (hereafter referred to as the Act) shows that it was the intention of Congress merely to state existing law with respect to judicial review. Judicial review is provided for in Section 10 of the Act. The very terms used by the Congress in this section are an indication of the broad sweep of Congressional intent.

Point by point consideration of Section 10 will demonstrate, it is believed, that the plain meaning of the statute is inconsistent with appellee's theory that it is merely a restatement of existing law.

A right of review is afforded to "*any person suffering legal wrong* because of *any agency action* * * *" Review was provided in the form prescribed by any statute or "in the absence or inadequacy thereof, *any* applicable form of legal action * * *" Review was extended to *all* actions, both civil and criminal, and in case statutory remedies already provided proved inadequate, review was provided by this Act.

Subsection (c) of Section 10 provides what acts are reviewable. In contrast with the usual rule prevailing before the passage of the Act "*every* agency action" for which there is no other adequate remedy in any Court was made subject to judicial review. Not only were final actions made reviewable, but "*any preliminary, procedural, or intermediate agency action* or ruling not directly reviewable * * *" was made subject to review. Finally, meeting the rule sometimes applied, that until those affected by administrative agencies apply for reconsideration or redetermination, agency action is not reviewable because not final, the Act provides that there shall be no requirement of a demand for reconsideration unless the agency provides for this by rule and *inter alia* provides that the action meanwhile shall be inoperative.

And in subsection (d) of Section 10, the Congress met the rule that plaintiffs must exhaust their administrative remedies before seeking the aid of a Court. This subsection of the Act authorizes Courts, "upon such conditions as may be required and to the extent necessary to prevent irreparable injury * * *"

to take effective action to preserve status or rights pending conclusion of the review proceedings.

In the concluding subsection of Section 10, the Congress set forth the scope of review, and the conditions under which, and the methods by which, any wrongful agency action might be remedied. The extraordinary sweep of the power there granted to the Courts, to control the action of administrative agencies, is perhaps without precedent in American statutory law. The Court is required to decide (1) all relevant questions of law; (2) interpret constitutional and statutory provisions; (3) determine the meaning or applicability of the terms of any agency action. That having been done, the Act says that the Court shall:

> (A) Compel agency action unlawfully withheld or unreasonably delayed; and
>
> (B) Hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) contrary to constitutional right, power, privilege, or immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (4) without observance of procedure required by law;
>
> (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of the Act or otherwise reviewed

on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing Court.

And in its consideration and disposition of the case, the Court is enjoined to *review the entire record* or such portion as may be cited by any party, and to take account of the rule of prejudicial error. Here Congress clearly manifests its intention to do away with the rule that "any evidence" or "a scintilla of evidence" will support an administrative determination. This is in itself an important change in the prior law.

It is natural that a Congressional enactment passed without significant opposition and after approximately ten years of intensive study and the formation and consideration of numerous bills aimed at the same problems, should be important, new, and perhaps disturbing. The valiant attempt of administrative agencies and of some Courts to minimize the importance of what Congress here attempted and to shrink its scope to a mere restatement of already existing law is therefore understandable.

An examination of the section discussed above should be made in the light of the clamorous attacks on administrative agencies that were dinned into the ears of Congress since the days of the first Roosevelt administration. It should take into account the reaction of many conservative elements in our society to

the tremendous expansion of administrative agencies which took place in the Roosevelt administrations. Consideration of the Act in the light of administrative law as it existed prior to the enactment of this statute, must lead a dispassionate Court to the conclusion that the Congress was not here engaged in an uncalled for and useless restatement of already existing law.

It was on the contrary forging a new weapon for governmental use in coping with the complexities of modern life. That is, it was here attempting to regulate the use of administrative agencies so as to prevent the formation of a bureaucracy foreign to American traditions, yet powerful and efficient enough to cope with its tremendous tasks. No other reason can be advanced for the ten years of Congressional labor which produced this Act. The elephant did not labor to bring forth a mouse.

B. Congressional debate demonstrates legislative intention to include deportation procedures in the scope of the Act.

Whatever the Attorney General's attitude toward this Act may have been, the debate in Congress documents the broad Congressional intent which has just been discussed.

Appellee argues that deportation proceedings fall within the exception stated in Section 10 of the Act, excluding from judicial review cases in which "statutes preclude judicial review." That the House understood that judicial review was given in every instance where not expressly excluded is demonstrated by the following excerpt from the House debate. Rep. Dolliver, in discussing the bill, remarked:

"* * *Not only does it promote uniformity but it codifies the procedures in a court review. This part of the bill has just been explained by my colleague the gentleman from Indiana [Mr. Springer]. Because of the necessity of passing the bill, how great have been the abuses in some of the agencies concerned. [sic.]

Personally, I think perhaps this bill does not go far enough in that direction. I believe I should welcome the opportunity to vote for a bill that would curtail the exclusion with respect to judicial review that are here contained.

Mr. Walter. Mr. Chairman, will the gentleman yield?

Mr. Dolliver. I yield.

Mr. Walter. I would like to call the gentleman's attention to the fact that there is no exclusion whatsoever. The decision of an agency created *by statute that prohibits a review is the only one excluded.* We are anticipating the possibility that some time or other such an agency *will be* erected." (Emphasis supplied.)

"Mr. Dolliver. I was referring to exactly the point that the gentleman has raised, that there are certain statutory exclusions now existing which are not covered by this bill. Perhaps there is just one agency and I believe the gentleman and I understand which one that is. I still say I would welcome an opportunity to consider legislation which would include that excluded agency." (Congressional Record, May 24, 1946, p. 5658.)

And in Representative Walter's presentation of the bill to the House for passage, he discussed the bill section by section and remarked as follows:

"JUDICIAL REVIEW, SECTION 10

Section 10 is a comprehensive statement of the right, mechanics, and scope of judicial review. It requires an effective, just, and complete determination of every case and every relevant issue. It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone—see *Perkins v. Lukens Steel Co.,* (310 U.S. 113).

Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark v. Wickard* (321 U.S. 288 at p. 317). * * *" (Congressional Record, May 24, 1946, pp. 5654, 5655, 5658.)

In the Senate, the same point of view was presented by Senator McCarran, the Senate sponsor of the bill. In his discussion just prior to final passage, he said:

"Mr. McCarran. Let me go a little further, because I am very grateful to the Senator for bringing up this question. We asked the Attorney General and the Department of Justice to comment on this bill. I now read to the Senate the Attorney General's comment:

Section 10 (a): Any person suffering legal wrong because of any agency action, or ad-

versely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co. v. Ickes* (302 U.S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: *Massachusetts v. Mellon* (262 U.S. 447), *The Chicago Junction Case* (264 U.S. 258), *Sprunt & Son v. United States* (281 U.S. 249), and *Perkins v. Lukens Steel Co.* (310 U.S. 113). An important decision interpreting the meaning of the terms 'aggrieved' and 'adversely affected' is *Federal Communications Commission v. Sanders Bros. Radio Station* (309 U.S. 470)." (Congressional Record, March 12, 1946, p. 2153.)

This was referred to by Senator Austin a few minutes later:

"Mr. Austin. Mr. President, will the Senator yield to me once more?

Mr. McCarran. Yes; I yield.

Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?

Mr. McCarran. That is correct.

Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward *for the purpose of remedying that efect and providing a review to all persons who suffer a legal wrong or wrongs* of the other categories mentioned?" (Emphasis supplied.)

"Mr. McCarran. That is true; the Senator is entirely correct in his statement." (Congressional Record, March 12, 1946, p. 2154.)

Senator Austin reverted to the point again:

"Mr. Austin. Mr. President, will the Senator yield at this point?

Mr. McCarran. I yield.

Mr. Austin. In the event that there is no *statutory* method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto and so forth?

Mr. McCarran. My answer is in the affirmative. That is true.

Mr. Austin. And does he contemplate that even where there is *no statutory authority* for certiorari, a party might bring certiorari against one of these agencies?

Mr. McCarran. Unless the basic statute prohibits it.

Mr. Austin. I thank the Senator." (Emphasis supplied.) (Congressional Record, March 12, 1946, p. 2159.)

Senator Barkley raised a question which made it clear that the statutory preclusion must be specific:

"Mr. Barkley. Mr. President, will the Senator yield?

Mr. McCarran. I yield.

Mr. Barkley. The bill assumes then that when Congress has heretofore passed legislation providing *that there shall be no access to a court,* Con-

gress had a particular reason for enactment of such legislation, and the bill's provisions would also apply to future legislation of a similar kind.

Mr. McCarran. Yes * * *'' (Emphasis supplied.) (Congressional Record, March 12, 1946, p. 2157.)

And finally, in a discussion between Senator McCarran and Senator McKellar, it was demonstrated that the principle purpose underlying the Act was to provide appeal to the Courts:

"Mr. McKellar. Mr. President, will the Senator again yield?

Mr. McCarran. I yield.

Mr. McKellar. May I ask the Senator a very general question, which will show that I have not examined the bill with care? Do I correctly understand that the *principal purpose* of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?

Mr. McCarran. Yes.

Mr. McKellar. That is the general underlying purpose of the bill?

Mr. McCarran. *Yes.* * * *'' (Emphasis supplied.) (Congressional Record, March 12, 1946, pp. 2156-57.)

Congressional discussion of the *scope* of the review provided demonstates that except where Congress had specifically excluded it, it was to change the existing law and broaden review. This is indicated by a colloquy which occurred between Senator McCarran and Senator Donnell during Senator McCarran's discussion of the provisions of Section 10 that "any per-

son suffering legal wrong because of any agency action" is entitled to judicial review:

"Mr. Donnell. Mr. President, will the Senator yield for an inquiry?

Mr. McCarran. I yield.

Mr. Donnell. I should like to ask the distinguished Senator a question. Section 10 of the bill recites in part that—

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, *although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion,* is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?" (Emphasis supplied.)

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator, that the thought uppermost in presenting this bill is that where an

agency without authority or by caprice makes a decision, then it is subject to review." (Congressional Record, March 12, 1946, pp. 2153 to 2154.)

Mr. Walter's discussion of the bill in the House contained the following:

"SCOPE OF REVIEW, SECTION 10 (E)

* * * * * * *

The term 'substantial evidence' as used in this bill means evidence which on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference.—cf. *Edison Co. v. Labor Board* (305 U.S. 197, 229-230). Under this bill it will not be sufficient for the court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some 'tenuous support of evidence'—*Bridges v. Wixon* (326 U.S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

* * * * * * *"

(Congressional Record, May 24, 1946, pp. 5654 to 5655.)

That the Act was intended to extend the scope of review was made clear by Mr. Walter's discussion of Section 10(D):

> "Temporary Relief, Section 10 (D)
>
> Of importance in the field of judicial review is the authority of courts to grant temporary relief pending final decision of the merits of a judicial-review action. Accordingly section 10 (d) provides that any agency may itself postpone the effective date of its action pending judicial review or, upon conditions and as may be necessary to prevent irreparable injury, reviewing courts may postpone the effective date of contested action or preserve the status quo pending conclusion of judicial-review proceedings.
>
> The section is a definite statutory statement *and extension of rights* pending judicial review. It thus, so far as necessary, *amends statutes* conferring exclusive authority upon administrative agencies to take or withhold action. Its operation will involve no radical departures from what has generally been regarded as an essential and inherent right of the courts; but, however that may be, this provision confers full authority to courts to protect the review process and purpose otherwise expressed in section 10." (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5654.)

As is noted in 49 Columbia Law Review, 73 at p. 75, the legislative history of the Act demonstrates what may be a difference in point of view between the Attorney General and the Congress. This possible differ-

ence was recognized in the Senate by Senator McCarran who remarked:

> "The bill includes several types of incidental procedures. It confers numerous procedural rights. It limits administrative penalties. It contains more comprehensive provisions for judicial review for the redress of any legal wrong. And, since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such.
>
> The pending bill is more complete than the solution favored by the majority of the Attorney General's committee, but is, at the same time, shorter and more definite than the proposal of the minority of that committee. While it follows generally the views of good administrative practice as expressed by the whole of that committee, it differs in several important respects.
>
> The bill provides that agencies may choose whether their examiners shall make the initial decision or merely recommend a decision, whereas the Attorney General's committee made mandatory a decision by examiners.
>
> The bill provides some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing, while the Attorney General's committee did not touch upon that subject.
>
> This bill relies upon independence, salary security, and tenure during good behavior of examiners within the framework of the civil service, whereas the Attorney General's committee favored short-term appointments approved by a special Office of Administrative Procedure." (Congressional Record, March 12, 1946, p. 2151.)

In the House, Mr. Walter made reference to the attitude of the sponsors of the bill, and the provisions of the bill, regarding examiners. He there remarked:

"EXAMINERS, SECTION 11

One of the most controversial proposals in the field of administrative law relates to the status and independence of examiners who hear cases where agencies themselves or members of boards cannot do so. I have heretofore referred to this problem in my discussion of section 8 respecting decisions. Both sections 7 and 8 authorize the use of examiners. Section 11, which I am about to discuss, provides for their selection, tenure, and compensation.

It is often proposed that examiners should be entirely independent of agencies, even to the extent of being separately appointed, housed, and supervised. At the other extreme there is a demand that examiners be selected from agency employees and function merely as clerks. In framing this bill we have rejected the latter view, as the Attorney General's committee on administrative procedure throughout the greater part of its final report rejected it, and have made somewhat different provision for independence. Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission.

Accordingly, section 11 requires agencies to appoint the necessary examiners under the civil

service and other laws not inconsistent with the bill. But they are removable only for good cause determined by the Civil Service Commission after a hearing, upon the record thereof, and subject to judicial review. Moreover, their compensation is to be prescribed and adjusted only by the Civil Service Commission acting upon its independent judgment. The Commission is given the necessary powers to operate under this section, and it may authorize agencies to borrow examiners from one another.

If there be any criticism of the operation of the civil-service system, it is that the tenure security of civil service personnel is exaggerated. However, it is precisely that full and complete tenure security which is widely sought for subordinate administrative hearing and deciding officers. Section 11 thus makes use of past experience and existing machinery for the purpose." (Congressional Record, May 24, 1946, p. 5655.)

Senator McCarran, by way of summary, indicated that this bill was expressly designed to do more than codify existing administrative law. He said:

"I cannot emphasize too strongly that the bill now before the Senate is not a specification of the details of administrative procedure. Neither is it a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration and in the light of the comprehensive studies I have previously mentioned." (Congressional Record, March 12, 1946, p. 2151.)

Comment on availability of review appearing in 49 Columbia Law Review 73, cited supra, at p. 80, appears to state the problem thoroughly:

> "Is review of deportation orders precluded by statute within the meaning of Section 10 by virtue of the provision in the Immigration Act concerning the finality of the decision of the Attorney general;[64] or is this construction negated by the judicial practice of affording review by habeas corpus? The legislative history of the Procedure Act makes no mention of the problem with respect to deportation. However, Representative Walter, Chairman of the Subcommittee of the House Committee on the Judiciary which considered the measure, pointed out that the exclusion clause of Section 10 was intended to provide merely for the unusual situation where judicial review is 'actually' precluded.[65]
>
> To the extent that the courts have made habeas corpus available as a method of reviewing deportation orders,[66] the decision of the Attorney General has not in effect been 'final', nor has it been 'committed to agency discretion.' It would seem presumptuous at best to say that the same statute which has long been interpreted by the courts as permitting at least one form of judicial review now precludes it. In *United States* ex rel. *Trinler v. Carusi*[67] the Circuit Court of Appeals for the Third Circuit employed this reasoning in holding that Section 10 was applicable to deportation proceedings. A New York District Court reached the same conclusion in *United States* ex rel. *Cammarata v. Miller*[68] in reliance on the *Trinler* analysis. The same court had in an earlier decision tacitly assumed the applicability of Section 10.[69] Moreover, by declaring that Section 10 will effect

no 'appreciable change' in existing 'principles,'[70] the former Commissioner of Immigration presumably concurred in this view.

The only court to have reached a contrary result[71] approved the dissent in the *Trinler* case, which declared that habeas corpus was not a form of review and hence that the finality clause of the Immigration Act had not been impaired by judicial practice.[72] *However, this position seems untenable in view of Section 10(b) of the Procedure Act which specifically includes habeas corpus as a form of review.*[73]'' (Emphasis supplied.)

''65. 92 Cong. Rec. 5654. The House Report states: 'To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its fact give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold it.' H.R. Rep., *supra* note 23 at 41.

67. 166 F. (2d) 457 (3d Cir. 1948).

68. 79 F. Supp. 643 (S.D.N.Y. 1948).

69. United States *ex rel.* Lindenau v. Watkins, 73 F. Supp. 216 (S.D.N.Y. 1947), *rev'd on other grounds sub nom.,* United States *ex rel.* Pateau v. Watkins, 164 F. (2d) 457(2d Cir. 1947).

71. Lee Tack v. Clark, Civil No. 46-279, S.D. N.Y., June 30, 1948; *cf.* Azzollini v. Watkins, 17 U.S.L. WEEK 2201 (S.D.N.Y. Oct. 18, 1948) (§ 10 inapplicable to deportation, but even if applicable, facts of petition insufficiently pleaded to warrant stay of deportation pending review).

72. *See* 166 F. (2d) 457, 462 (2d Cir. 1948).'' (Some footnotes omitted.)

II. APPLICATION OF THE PROCEDURAL REQUIREMENTS OF THE ACT TO DEPORTATION HEARINGS.

The application of the procedural requirements of the Act to deportation hearings has been passed upon by the Court of Appeals for the District of Columbia in *Wong Yang Sung v. Clark,* 80 F. Supp. 235, affirmed without opinion, 174 F. (2d) 158. The first problem presented by the Act is whether the hearing and a decision on the record which brings Section 5 into play is required "by statute". This problem has been discussed in appellants' opening brief. Further research into the legislative history of the Act discloses that Congressman Walter referred to the policy behind the provisions of Section 5. He said:

> "Mr. Walter. * * * Section 5 relates to the judicial functions of administrative agencies when they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions. The requirements of Section 5 are thus limited to cases in which statutes otherwise require a hearing, *because, where statutes do not require an agency hearing, the parties are entitled to try out the pertinent facts in court and hence there is no reason for prescribing informal administrative procedure* beyond the requirements of Section 6 which I will discuss presently * * *" (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5756.)

Since except in cases where a claim of citizenship is made, a deportee may not try the facts *de novo* in

Court, this clearly removes deportation hearings from the exception in Section 5 of the Act.

Appellee relies in part upon another alleged exception in the Act, that relating to "foreign affairs functions" of the United States, citing *Pantelis Yiakoumis et al. v. Hall,* 83 Fed. Supp. 469. That deportation procedures were not included within the concept of foreign affairs functions is demonstrated by the following excerpts from Congressional debate:

> "Mr. Walter. * * * The exempted foreign affairs are those diplomatic functions of *high importance which do not lend themselves to public procedures* and which with the general public is ordinarily not directly concerned." (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5755.)

A more serious question is presented by the language of Section 7(a) of the Act which contains the exception "* * * but nothing in this act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute." The legislative history of the Act discloses that hearings were held by a subcommittee of the Senate Committee on the Judiciary in 1941 on three bills, which preceded the bill which subsequently became the Act. Those bills were designated S. 674, S. 675 and S. 918. On April 30, 1941, Major Lemuel B. Schofield, Special Assistant to the Attorney General in Charge of the Immigration and Naturalization Service, testified before the committee

with regard to the application of these bills to the Immigration and Naturalization Service. See *Hearings before a Subcommittee of the Committee on the Judiciary,* Part 2, April 30 to May 22, 1941, p. 556, et seq.

Major Schofield discussed the work of the Service in considerable detail and considered the effect of the bills upon the Service as a whole. In particular, he discussed the application of the provisions of those bills to deportation and exclusion hearings. His statement on these points assumed at all times that the legislation then under consideration would apply to deportation and exclusion hearings, that it would require a change in the procedure of the Service, that it would require the appointment of special hearing officers for the adjudication of deportation and exclusion cases, and finally, that this would be not only feasible but that it would be desirable.

The provisions of the three bills there under consideration on this point are compared in tabular form in a chart submitted to the Senate subcommittee by Mr. Arthur T. Vanderbilt in connection with his testimony appearing at page 1307, Part 3 of the Report of the hearings cited above. This was submitted in connection with the testimony of the minority members of the Attorney General's committee which appears at pages 1304 to 1418 in Part 3 of the same Report. The table may be found at pp. 1564 to 1577 of Part 4 of the Report. With regard to hearing officers, three bills and proposals of a minority and majority of the Attorney General's committee are compared as follows:

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H.R. 3464 and S. 918)
Subordinate hearing officers.	No provision other than above.	Provision for appointment, upon the recommendation of the agency concerned by an independent Office of Administrative Procedure and removal only for cause after hearing before a similarly independent tribunal; tenure of 7 years at a fixed salary; similar provision for appointment of "provisional" hearing officers for 1 year; provision for appointment of "temporary" hearing officers by a "director" alone; provision for the loan of hearing officers by one agency to another; provision for "chief" hearing officers in agencies having more than five hearing commissioners.	Similar to majority bill, except (1) omission of authority for appointment of "temporary" hearing officers, (2) omission of provisions for "chief" hearing officers, (3) a more flexible salary scale to be adjusted by the independent appointing authority with a prohibition of agency control over salaries, (4) longer tenure, and (5) authority for reappointments by the independent board without the intercession of the agency concerned.	Discussed and recommended at pp. 46-50. See also note at p. 239, explaining the minority changes. One member recommends that subordinate hearing officers be appointed by an independent agency without the recommendation of the agency concerned and that such officers be assigned to no agency but merely be assigned by the independent appointing board "to the hearing of cases as the needs of the agencies require" (p. 250).	Presiding officers to conduct formal hearings outside Washington to be appointed by appropriate United States District Court, I. C. C., and Patent Office proceedings excepted.
Disqualification of hearing officers.	No provision except members of intra-agency boards having previous participation in case or making of rule involved.	Provision for filing of affidavit of disqualification, to be acted on by a "chief hearing commissioner" in each agency, and the ruling to become a part of the record.	Similar, but affidavit to be passed upon by agency head.	No discussion	Presiding officer may withdraw if he deems himself disqualified. No disqualifying procedure.
Powers of hearing officers.	Provision for administration of oaths and issuance of subpenas.	Provision for administration of oaths, issuance of subpenas, taking of depositions, regulation of hearings, admission or exclusion of evidence, and rulings upon questions and cross-examination.	Similar to majority provision	Discussion at p. 50	Similar to S. 674.

Major Schofield discussed the provisions of S. 918 and S. 674 with regard to representation of aliens before hearing officers in immigration cases and concluded that they were objectionable to the agency. He then went on to say (Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, Part 2, p. 571):

> "For these reasons, the Service feels that S. 674 and S. 918 are not suited to the proper administration of our laws and would most seriously interfere with such administration. The two bills are inflexible, and lose sight of the particular problems which face us. On the other hand, S. 675 in general charts a far more discriminating course. It has that flexibility which the other two bills lack. It recognizes that there are a great number of matters coming before an agency for which formal procedures are unsuitable. Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases.
>
> "If its requirements applied to the other matters which we have to decide, we would, of course, be opposed to that, also, but assuming that its requirements apply only to deportation and exclusion cases, then we think it is much more adaptable to our Service, much more suitable to our Service than the other two.
>
> "Now insofar as deportation cases and exclusion cases are concerned, we already hold hearings and base our decisions upon such hearings. Indeed, S. 675 would make considerable changes in

> our existing procedures. Our boards of special inquiry which now hear admission cases would be replaced by independent hearing commissioners. The inspectors who hear deportation cases, would be similarly replaced, and whice in such cases, the inspector does not now make a decision, under S. 675, he would make such a decision—that is, the hearing examiner would—which would be appealable to the Board of Immigration Appeals.
>
> "We agree with the view of the majority of the Attorney General's Committee that it is desirable to vest the power of decision in the man who heard the case and saw the witnesses, insofar as possible. We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws."

Appellee makes the point in his brief that it was proposed that whatever act was passed contain a provision, delineating cases where formal hearings were required and where the procedural requirements of the act would apply, to the effect that they should apply only where hearings are "required by the Constitution or statutes to be determined after opportunity for formal hearing." Appellee's brief, p. 36. Appellee there cites a portion of Major Schofield's testimony. The complete discussion by Major Schofield is as follows (op. cit., pp. 577 to 578, Part 2 of the hearing reports):

> "Now, when we come to section 301. We think there ought to be some clarification of the first part of that section. As it now reads, it provides that the section—that the act—the section of this

title, as a matter of fact, 'shall be applicable to proceedings where rights, duties, or other legal regulations are required by law to be determined after opportunity for hearing.'

"We think that that ought to be made more specific and that it ought to read something like this: That they shall apply 'only to proceedings wherein rights, duties or other legal relations are required by the constitution or statutes to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.'

In other words, so that it woeuld be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases.

We, now, in many instances, grant hearings *in matters where the law doesn't require a hearing,* as for example, an alien who desires an extension of his stay." (Emphasis supplied.)

"We will treat such an alien informally if he calls or through his counsel if he calls, or both together, and if he asks for it, we accord him a hearing, which is formal in its character, and in which he is accorded the right to advance, through testimony and through witnesses, if he desires, his reasons in support of his application for an extension of his temporary visit, but that is purely regulatory, not required by statute, and we don't think that there ought to be a necessity for such a hearing in every one of those thousands of cases, which might be required if the wording of section 301, the first part of it, remains as it is now printed."

This comment discloses that the objection of the Service to the term "required by law to be determined after opportunity for hearing," was not that this would require hearings in deportation cases, since the immigration law has been so interpreted in the absence of a specific statutory requirement of hearing. On the contrary, this change in the wording of the bills then under consideration was suggested with the understanding that exclusion and deportation hearings would still be required to be conducted in conformance with the procedural requirements of the bills and would, of course, require hearings. The only reason for proposing the changed language was that as the bills then stood, they might be interpreted as requiring hearings in matters which were then, and are now, adjudicated by the Department without a hearing in the exercise of ordinary administrative discretion.

Reference was made in appellants' opening brief to the statement by former Commissioner of Immigration Carusi in Immigration and Naturalization Service Monthly Review, 95,103, in which the Service took the position that it was not subject to the Act because the Immigration statute does not in terms require a hearing. Mr. Carusi did not there take the position that the exception in Section 7 (a) applied. Taken in connection with Major Schofield's testimony cited above this demonstrates that until very recently the Service made no contention that the hearing officers provided in 8 USCA § 152 were such statutorily designated officers as to come within the exception of the

Act. The attitude of the Service during Congressional consideration of this bill was that the Service welcomed the advent of new hearing officers, who would replace immigrant inspectors in deportation hearings.

There have, however, been several cases in which a similar contention has been passed upon by the courts. In *Loufakis v. U. S.,* 81 F. 2d 966, the Third Circuit considered an appeal from a contempt order directed against an alien who refused to answer questions in a deportation hearing. The court decided the case upon the erroneous ground that the constitutional guarantee against self-incrimination is not applicable to deportation proceedings. By way of dictum, it stated:

> "We are not convinced by the appellant's contention that the provisions of the above-quoted statute are restricted to exclusion cases. In our opinion the wording is sufficiently comprehensive to include deportation cases. The section by its very terms refers to aliens residing in the United States, and to evidence touching the right of any alien to reside in the United States. As it is too late to exclude an alien when he is already within the United States, it is obvious that the intent of Congress was to grant the requisite power in the event that it should be necessary to deport the alien. We think the District Court had the power to make the order and that the appellant's refusal to comply amounted to contempt. The order is affirmed."

The *Loufakis* case was followed without any extended discussion in *Graham v. U. S.,* 99 F.2d 746, in

which the Ninth Circuit Court incidentally pointed out the error of the Third Circuit on the question of self-incrimination.

The only case in which any extended discussion was given to the question of the application of 8 USCA § 152 to deportation cases was *U. S. v. Parsons,* 22 F. Supp. 149. In that case, Judge Yankwich of the District Court for the Southern District of California discussed at some length the contention that § 152 applied only to exclusion cases. This question is important in view of the fact that Judge Holtzoff of the District Court for the District of Columbia based his decision in *Wong Yang Sung, v. Clark,* 80 F. Supp. 235, affirmed in 174 F. 2d 158, upon the ground that this section clearly constituted a designation of hearing officers. The case before him was a deportation, as distinguished from an exclusion case.

Judge Yankwich, as did the other courts considering this proposition, found that the provision of the statute saying that immigrant inspectors should conduct the examination of aliens regarding their right to "reside in" the United States had reference to aliens who were already in the country and were, therefore, subject to deportation, rather than exclusion proceedings. He said:

> "If we examine the section in which the clause appears, it seems in the wrong place. It is preceded by provisions relating to the right of inspectors to examine persons who seek admission into the United States and is followed by provisions penalizing those who seek to interfere with the performance of these duties.

"However, it is a cardinal rule of statutory construction that effect will be given to legislative intent and legislative language, and that an interpretation should not be adopted which would make a provision meaningless or senseless * * * The right to 'enter, re-enter, or pass through' the United States, of which the enactment speaks, could refer only to persons who seek admission, by seeking to enter for the first, or to re-enter or to pass through the United States on their way to another country. But the words, 'reside in the United States,' could only refer to a person *who is in the United States* and desires to continue to reside therein. They were so interpreted in Loufakis v. United States, 3 Cir., 1936, 81 F. 2d 966. The interpretation accords with the evident aim of the statute.

"The power given to courts to command attendance before the Commissioner or Inspector and compel testimony to be given would be meaningless, unless we postulate that the Congress had in mind persons already within the United States. An alien, when he seeks admission to the United States, does not have the power to command what we shall or shall not do. We have the right to exclude whomever we wish and for any reason whatsoever, because we do not approve an alien's political or social ideas, or he belongs to groups which are likely to become a public charge, or for other similar reasons * * *

"If an alien seeking admission should decline to answer questions concerning his right to be in the United States, it would be a useless act on the part of the Immigration Commissioner or Inspector to seek an order from a United States Court

to compel him to give testimony. Why ask for it when all he need do is to say to the alien, 'If you do not answer the questions concerning your right to enter the United States, you shall not enter.' If an order should be secured, how would it be served on the alien? If the alien be detained at a seacoast port, pending the determination of his right to enter, he might be detained on an isle or on board ship and there served. But assume the alien is at the Canadian or Mexican border and is not allowed to cross it. Process cannot be issued by a District Court effective beyond its territorial jurisdiction. Nor can it be served there * * * Unless, therefore, we give effect to the words 'reside in the United States,' and apply the clause to deportation proceedings, the right of immigration authorities, in the performance of their duties under the law, in enforcing the uncontested right of a sovereign power to determine whom it shall receive within its borders, would be rendered ineffective."

The statute in question here provides, as Judge Yankwich noted, for the examination of aliens seeking admission into the United States. It then provides that immigrant inspectors are authorized to search any vehicles in which they belive aliens are "being brought into" the United States. Then follows the provision that these inspectors shall have the power to administer oaths and take and hear evidence "touching the right of any alien to enter, re-enter, pass through, *or reside* in the United States * * *" (emphasis supplied). The courts in the three cases discussed above have felt that the words "or reside"

refer to persons in the United States. An equally logical interpretation is that the immigrant inspectors, in examining aliens who seek to enter the United States, are to examine them regarding their right to enter for the purposes of conducting a business here in the status of "treaty merchants," or to enter for the purpose of studying at American universities, or for the purpose of passing through the United States enroute to some other country, or to reside in the United States as permanent residents thereof. Nothing in this section of the Act requires the words "or reside" to be interpreted as applying only to those who are already within the United States, since the purpose of those who seek to enter the United States, may be to reside here, or visit temporarily, or to do some other thing in the United States not ordinarily comprehended within the meaning of the term "reside." And when it is considered that this term occurs in a section, all of whose provisions except this one clearly refer to the examination of aliens seeking admission to the United States, there appears to be no reason for preferring appellee's interpretation and a great deal of reason for construing this phrase in harmony with the remainder of the section in which it appears.

A ready answer appears to Judge Yankwich's question, what was the purpose of inserting in this section powers of contempt to be used against those who fail to appear and testify before immigrant inspectors. There is nothing in the Act to indicate that the contempt proceedings were to be instituted against the

alien seeking admission. But they clearly would apply to and be useful in compelling the testimony of others who possessed information or documents relating to the right of the alien to enter the United States.

It is these persons against whom the weapon of contempt proceedings was aimed. The reason for Judge Yankwich's decision, upon examination, appears to be less than compelling.

In this District, in the case of *Wong So Wan* and *Wong Tuey Wan,* 82 F. Supp. 60, cited by appellee on page 58 of his brief, Judge Goodman remarked that the Administrative Procedure Act "certainly" does not apply to preliminary examinations in exclusion cases. The theory supporting this is apparently that the designation of immigrant inspectors as statutory hearing officers in exclusion cases is even more crystal clear than their designation for deportation hearings. Yet the practice of the Service has been to assign to Boards of Special Inquiry, pursuant to the provisions of 8 USCA § 153, persons who are not immigrant inspectors and who presumably do not possess the special qualifications which are claimed for these persons. See *Immigration and Nationality Laws and Regulations* as of March 1, 1944, p. 819, Part 130 § 130.1:

> "Boards of special inquiry shall be composed of three members. Boards shall consist of duly designated immigrant inspectors, one of whom shall act as chairman, except that a duly designated immigration employee may serve as the third member and secretary."

The statutory authority for this is the provision in 8 USCA § 153 regarding boards of special inquiry:

> "Each board shall consist of three members, who shall be selected from such of the immigrant officials in the Service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."

This should be considered in the light of the portion of 8 USCA § 152, which provides that:

> "The inspection, other than the physical and mental examinaation, of aliens, * * * shall be conducted by immigrant inspectors except as hereinafter provided in regard to boards of special inquiry * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land, shall be detained for examination in relation thereto by a board of special inquiry."

The statutory scheme apparently was for the examination of aliens seeking to enter the United States, at the port of entry, in an informal manner, by an immigrant inspector. In the even the immigrant inspector felt some doubt as to the right of the alien to land, he was to be examined by a board of special inquiry, whose composition was, by Congress, left in the discretion of the Attorney General. This board could be composed of immigrant inspectors or of any other authorized persons.

That this was the practical interpretation given by the Service to these code sections before the passage

of the Act is demonstrated by Major Schofield's testimony before the Senate subcommittee. He was discussing the salary levels of the new hearing officers who would be required by the legislation which the committee was considering and he stated, at p. 573 of the report of the hearings:

"Major Schofield. The committee must realize that *an immigrant inspector performs many other duties in addition to conducting hearings,* and his services would still be required to perform those other duties. Ships must be boarded, seamen must be examined and fingerprinted, papers must be lifted, trains must be boarded, airplanes must be met and the passengers examined, and so on.

"Last year, the fiscal year ending June 1940, we made at seaports alone 1,600,890 examinations of one kind or another. People seeking to come in—that includes everybody; sailors, passengers, citizens, non-citizens, every kind.

"At the land-border ports there were arrivals to the number of 50,102,398.

"Senator Danaher. That includes border crossings, doesn't it?

"Major Schofield. Everything. Repeated crossings. Commuters and everybody, but they all must be examined. It includes aliens and citizens, too, but there were that many examinations which had to be made by our Service. So that the total for the fiscal year ending 1940 and 51,703,288. Now that means that we must have an adequate staff and force of immigrant inspectors, and so if we are by statute now to provide for hearing commissioners in the main, not entirely, but in

> the main they will have to be appointed new. Additional personnel in our Service." (Emphasis supplied.) [Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, Part 2, April 30 to May 22, 1941].

Reference has already been made to the fact that there is some difference of interpretation revealed in the Congressional debate and the comments of the Attorney General. That the Congressional debate is controlling in such a situation is axiomatic. It is the Congressional intent that we are seeking to determine. But assuming for the sake of argument that the legislators may have had in mind the Attorney General's comments when this Act was passed, and that the Congressional intent is not therefore entirely free from doubt, what of the policy of the law with regard to the question presented in this case? The separation of investigating and prosecuting officers of administrative agencies from adjudicating officers is a development to which the courts, the bar and Congress have frequently given attention. The evils of combining these functions in the same persons are nowhere more clearly illustrated than in cases like those here before this Court.

Here, the presiding inspector is required to determine, under the issues presented by the warrant for the arrest and deportation of these aliens, whether the aliens belonged to the Communist Party. The inspector must then, if he determines this in the affirmative, determine whether or not this organization is one which advocates the overthrow of the Government

of the United States by force or violence or other unconstitutional means. The immigrant inspector is a subordinate of the Attorney General. The Attorney General, under the provisions of the President's Loyalty Order, 12 Fed. Register 1935, has already determined this question. The immigrant inspector is therefore free to decide the question in any other way only at the risk of incurring doubt of his own loyalty to the Government of the United States. See 58 Yale Law Review 1, where Professor Tom Emerson and others discuss the all-prevading fear of loyalty investigations which has been produced by the President's Order. An independent determination of this question can be expected only from a hearing officer whose independence is assured by those safeguards intended by Congress to be secured by the Act and referred to in the Senate debate quoted supra at p. 16.

It is respectfully submitted that the Congressional intent, first of all to provide judicial review other than by habeas corpus in deportation cases, and secondly, to require deportation hearings to be conducted in conformance with Sections 5, 7 and 8 of the Act, is quite clear. And upon reason and policy, it is maintained that this Court should give effect to that Congressional intent notwithstanding the decision of the Court of Appeals for the Second Circuit to the Contrary.

Respectfully Submitted,
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